

Before the
Administrative Hearing Commission
State of Missouri



NOUELLE F. WHITFIELD,

Petitioner,

vs.

MISSOURI BOARD OF NURSING HOME
ADMINISTRATORS,

Respondent.

No. 13-2126 NH

DECISION

We deny Nouelle F. Whitfield's application to take the examination for a nursing home administrator license because she failed to show that she possessed a minimum of three years' experience in health care administration.

Procedure

The Missouri Board of Nursing Home Administrators ("the Board") denied Whitfield's application to take the licensure examination. Whitfield appealed the Board's decision by a complaint filed December 12, 2013 and an amended complaint filed December 13, 2013. The Board filed an answer on January 14, 2014.

We held our hearing on April 3, 2014. Whitfield was represented by David F. Barrett. Assistant Attorney General Ross Brown represented the Board. The case became ready for our

decision on June 9, 2014, when the last brief was filed. On August 30, 2014, the case was transferred to Commissioner Karen A. Winn, who, having read the full record including all the evidence,¹ renders the decision. Section 536.080.2, RSMo 2000;² *Angelos v. State Bd. of Regis'n for the Healing Arts*, 90 S.W.3d 189 (Mo. App. S.D. 2002).

Findings of Fact

1. Whitfield studied to be a licensed practical nurse (“LPN”) at Applied Technology Services from September 2003 to September 2004.
2. Whitfield obtained her LPN license on October 1, 2004. It was active at all relevant times.
3. Whitfield has not completed two years of post-secondary education in health care administration or 225 clock hours of formal instruction and training of the sort described in 19 CSR 73-2.031(2),³ or obtained an associate’s degree in health care administration or a baccalaureate or master’s degree in health care administration, gerontology, or nursing.
4. Since January 2013, Whitfield has worked as a minimum data set (“MDS”) coordinator at Green Valley Nursing and Rehabilitation Center (“Green Valley”). An MDS coordinator writes care plans for clients and oversees the coordination of their care.
5. At Green Valley, Whitfield oversees 30-40 function subordinates⁴ at any given time. Her position requirements include an ability to direct and coordinate others’ activities,

¹ We note that the record in this case includes, per agreement of the parties, the attachments to Whitfield’s original complaint filed on December 12, 2013, as well as her amended complaint filed on December 13, 2013. Tr. 72. In addition, we left the record open for ten days after the hearing to allow Whitfield to submit Exhibit D, which was a copy of her application for licensure submitted to the Board. That exhibit was timely submitted and is part of the record in this case.

² Statutory references are to the RSMo Supp. 2013 unless otherwise indicated.

³ All references to the CSR are to the Missouri Code of State Regulations as current with amendments included in the Missouri Register through the most recent update. 19 CSR 73-2.031(2) is a lengthy regulation that sets forth many topics such as nursing and physician services, social services, food services, and social and therapeutic activities.

⁴ As discussed below, there is no definition in the record for a “function subordinate.”

motivate subordinates and peers, and take ownership in top management decisions. Her responsibilities include implementation and supervision of the restorative nursing program and restorative aides. Her tasks include determining that all individuals involved in the RAI process complete their specific MDS sections, CAAs and Care Plans according to the time frame regulated by CMS.⁵

6. Between September 2011 and July 2012, Whitfield worked as an MDS coordinator at Pillars of North County nursing home. She oversaw 15-20 function subordinates. Her responsibilities included ensuring that the clinical operations complied with regulations while honoring person-centered care, as well as staff education in areas of appropriate documentation, infection control, and job duties.

7. Between March and May 2011, Whitfield worked as an MDS coordinator at Ackert Park. She oversaw 1-5 function subordinates. Her tasks included investigating and resolving staff and family complaints, auditing charts/clinical procedures, training and monitoring of staff job performance, and training and orientation for new hires.

8. Between December 2010 and May 2011, Whitfield worked as an MDS consultant at Manor Grove. She oversaw 1-2 “traditional subordinates”⁶ and 10 function subordinates. Her position requirements included an ability to direct and coordinate others’ activities, motivate subordinates and peers, and take ownership in top management decisions. Her responsibilities included implementation and supervision of the restorative nursing program and restorative aides. Her tasks included investigating and resolving staff and family complaints, auditing charts/clinical procedures, training and monitoring of staff job performance, and training and orientation for new hires.

⁵ Neither CAA nor RAI is defined in the record. We assume that CMS refers to the Center for Medicare and Medicaid Services within the United States Department of Health and Human Services.

⁶ Again, there is no definition for this term in the record.

9. Between August and October 2010, Whitfield worked as a lead MDS coordinator at Hillside Manor. She oversaw 3 traditional subordinates and 20-30 function subordinates. Her responsibilities including interviewing, hiring, and training employees, performing yearly performance evaluations, disciplining, and addressing staff complaints. Her tasks included coordinating nursing activities and staff work assignments, interpreting and enforcing department and community policies, and participating in development and monitoring of department budgets.

10. Between December 2009 and November 2010, Whitfield worked as a staff nurse at Kindred-St. Anthony's. She oversaw 1-5 function subordinates. Her tasks included monitoring patients' health, administering medication, supervising and monitoring ancillary staff, consulting physicians about residents' care or changes in condition, carrying out and monitoring medical orders, and participating on the code blue team to help patients who had gone into cardiac arrest.

11. Between September and December 2009, Whitfield worked as an MDS coordinator at Avalon Gardens. She oversaw 5 function subordinates. Her tasks included observing nursing care and visiting residents to ensure that such care was carried out as directed, directing the nursing assessment of residents, overseeing ancillary staff, completing the RAI process in accordance with law, and conducting care plan meetings with families and residents.

12. Between February and August 2009, Whitfield worked as a clinical reimbursement manager at Big Bend Woods. She oversaw 20-30 function subordinates. Her responsibilities included staff education in areas of appropriate documentation, infection control, and job duties. Her tasks included providing leadership and oversight for staff to maintain policies and procedures for clinical practices, implementing clinical policies and procedures that

ensured safe, sanitary, and efficient practices supporting professional standards of nursing care, and passing medication and overseeing the medication administration process.

13. Between November 2008 and February 2009, Whitfield worked as an MDS/care plan nurse at Heritage Care Center. She oversaw 20-30 function subordinates. Her tasks included managing and supervising employees in the nursing department, investigating and resolving staff and family complaints, interviewing, hiring, and training employees, and conducting administrative rounds one weekend a month to monitor staff for completion of assigned job duties.

14. On May 21, 2013, Whitfield applied to the Board to take the nursing home administrator examination.

15. On June 26, 2013, the Board considered Whitfield's application to take the examination and decided that she was not qualified to sit for it.

16. On June 28, 2013, Sally McKee, Coordinator for the Board, notified Whitfield by letter of the Board's decision. In the letter, McKee informed Whitfield that she would have to complete 225 clock hours of course work from an accredited college or university in certain designated areas, and complete 800 clock hours of internship under the direct supervision of a licensed administrator who was approved and designated as a preceptor by the Board.⁷ McKee also offered Whitfield the option of submitting new information to the Board for reconsideration of her application.

17. On July 15, 2013, Whitfield submitted the following new information in a letter to McKee: letters of reference from other nursing home administrators, an argument why her consulting work constituted management experience, a list of the facilities where she had

⁷ The 225-hour formal instruction and 800-hour internship requirement are part of the educational requirement set out for candidates who are in or have completed a licensed practical nurse program. 19 CSR 73-2.031(1)(B).

management experience and the time worked at each one,⁸ and a summation of that time—which, the letter states, constituted 44 months’ managerial experience.

18. On September 11, 2013, the Board re-evaluated Whitfield’s application to sit for the examination and again decided that she was not qualified. The Board also decided to offer Whitfield the opportunity to submit: (a) additional detailed information regarding her MDS consultant position, in the form of a letter from each facility indicating her job duties and experience, average number of hours worked per week, and how long she was at each position; and (b) a college transcript upon completion of her associate degree or a copy of a transcript indicating that the degree would be completed in December.

19. On September 13, 2013, McKee notified Whitfield of the Board’s decision and its request that Whitfield submit the additional information set out in the previous finding of fact.

20. Whitfield submitted letters to the Board from Laura Mace, Latrese Washington, and Joyce Moton, persons who had worked with Whitfield at Green Valley, Heritage Care Center, and Hillside Manor. These letters generally lauded Whitfield’s skills, including her management skills.

21. On December 4, 2013, the Board considered Whitfield’s request to re-evaluate her application to take the examination and again decided that she was not qualified.

22. On December 10, 2013, McKee notified Whitfield of the Board’s decision that she was not qualified to take the examination.

Conclusions of Law

We have jurisdiction of Whitfield’s appeal. Sections 344.050.1; 621.045. Whitfield must show that the law entitles her to licensure. Section 621.120 RSMo, 2000. When the

⁸ This list contains the same facilities as are set out in findings of fact 7 through 13 above. The list is found in Exhibit C, which we discuss below in our conclusions of law.

licensee files the complaint, the agency's answer provides such notice. *Ballew v. Ainsworth*, 670 S.W.2d 94, 103 (Mo. App., E.D. 1984). The Board's answer contends that Whitfield does not meet one of the qualifications for licensure, specifically the three years of experience in health care administration required by § 344.030.2(2), 19 CSR 73-2.020(2)(E), and 19 CSR 73-2.010(6).

Whitfield's Objection to the Board's Expert Testimony

The Board's only witness was Michael Roth, who the Board presented as an expert witness regarding the duties and responsibilities of an MDS coordinator. Roth has significant experience as a nursing home administrator. At the hearing, Whitfield objected to Roth's testimony on the grounds that Roth had also been a member of the Board that decided not to allow Whitfield to take the examination. Whitfield argues that because Roth has already considered Whitfield's case and participated in the Board's decision, his testimony would be influenced by his own prejudice and a desire to accommodate his fellow Board members. We took the objection with the case.

Whitfield did not object to Roth's expert status. Accordingly, we can consider the admissibility of his testimony as an expert. Section 490.065, RSMo 2000, governs admissibility of expert witness testimony. Section 490.065.1 provides:

[I]f scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise.

The statute says nothing about bias. Normally, an expert's bias may be explored and proven by cross-examining the expert.

Parties are given wide latitude in their cross-examinations of expert witnesses to test qualifications, credibility, skill or knowledge, and value and accuracy of opinion. The [trier of fact]

must determine the witness's credibility and the weight to give her testimony; it is entitled to know information that would affect this determination. Consequently, the witness's bias or prejudice may always be shown, subject to the [tribunal's] discretion.

Moon v. Hy-Vee, Inc. 351 S.W.3d 279, 284 (Mo. App. W.D. 2011) (internal quotation marks and citations omitted). In this case, Roth testified as to what MDS coordinators and similar personnel do in facilities where he has worked, and to some extent, what they do in nursing homes and similar facilities generally. His testimony concerning what MDS coordinators do contrasted with Whitfield's claim that the scope of her duties as an MDS coordinator was broader than that which Roth described. We therefore overrule Whitfield's objection and admit Roth's testimony. We weigh it against Whitfield's own testimony regarding her experience, which is both more relevant and probative as to the ultimate issue in this case: whether Whitfield possesses the requisite experience in health care administration.

Laws Requiring Experience in Health Care Administration

The laws governing Whitfield's right to sit for the examination are:

Section 344.030.2(2):

The applicant [must] provide the board satisfactory proof that the applicant has had a minimum of three years' experience in health care administration[.]

Regulation 19 CSR 73-2.020(2)(E)1:

The completed application form shall provide satisfactory proof that the applicant has met the following minimum requirements for Missouri nursing home administrator licensure: (E) Experience: A minimum of three (3) years of experience in health-care administration, full-time equivalency[.]

Regulation 19 CSR 73-2.010(6):

Experience in health-care administration shall mean having management responsibility, which shall include the on-site supervision of at least three (3) staff persons in a licensed long-

term care or acute-care facility or a licensed mental health facility, or a department of one of these facilities.

Are the Regulations Invalid?

Whitfield claims the Board's regulations are invalid and we should not follow them. Citing *State Tax Comm'n v. Administrative Hearing Comm'n*, 641 S.W.2d 69, 76 (Mo. banc 1982), the Board argues that this Commission lacks the authority even to consider Whitfield's arguments and that, short of a constitutional amendment, the legislature cannot grant that power to us. With respect to the first of Whitfield's arguments – that the Board's regulation impermissibly expands the reach of § 344.030.2(2) – we disagree. While we must follow regulations that are consistent with the statutes, *Bridge Data Co. v. Director of Revenue*, 794 S.W.2d 204, 207 (Mo. banc 1990), when there is a direct conflict or inconsistency between a statute and a regulation, the statute, which represents the true legislative intent, must necessarily prevail. *Parmley v. Missouri Dental Bd.*, 719 S.W.2d 745, 755 (Mo. banc 1986). In *Bridge Data*, when this Commission applied a regulation that apparently conflicted with a statute in reliance on *State Tax Commission*, the court characterized our reliance on that case as “utterly misplaced.” 794 S.W.2d at 207. Therefore, we consider this point.

Did the regulations improperly expand on the experience requirement of § 344.030.2(2)?

Whitfield argues that 19 CSR 73-2.020(2)(E) improperly expands the requirement of § 344.030.2(2) that the applicant have three years' experience in health care administration by requiring that the three years be “full-time equivalency,” and 19 CSR 73-2.010(6) improperly expands the statute by defining “health care administration” as including a requirement that the candidate engage in “the on-site supervision of at least three (3) staff persons.” We disagree. 19 CSR 73-2.020(2)(E) simply appears to be the Board's attempt to carry out the will of the General

Assembly by not allowing applicants to evade the three-year requirement with experience not really equivalent to that.

With respect to 19 CSR 73-2.010(6), we note that “administration” is defined as “the performance of executive duties: MANAGEMENT, DIRECTION, SUPERINTENDENCE.” WEBSTER’S THIRD NEW INT’L DICTIONARY 28 (unabr. 1986). Nursing homes are labor-intensive businesses; supervision of staff is a key part of their administration. The Board’s requirement that an applicant have adequate supervisory experience is a reasonable attempt to implement the statute’s requirement that an applicant have relevant experience in “health care administration.” Accordingly, we do not see these regulations as an impermissible expansion of the statutory requirement, and we will apply them in making our decision on Whitfield’s application.

Are the regulations invalid because the Board was not a “legal board” when it promulgated them?

Whitfield argues that 19 CSR 73-2.020(2)(E) and 19 CSR 73-2.010(6) are invalid because the Board was not a “legal board” at the time it promulgated the regulations. She bases this argument on the assertion that, prior to the Board’s reorganization in 2007,⁹ the director of an agency appointed its members, rather than the Governor, with the advice and consent of the Senate as required by Mo. Const. art. IV, § 51. In essence, therefore, Whitfield asks us to decide that the Board’s regulations are invalid because they were promulgated unconstitutionally. To do so, we would have to find that the Board’s grant of rulemaking authority found in § 344.070,

⁹ The amendment to the relevant statute, § 344.060, was in fact not made until 2011 when the text, “The director of the department of health and senior services shall appoint ten suitable persons who...shall constitute [the Board]...” was replaced with, “The governor shall appoint with the advice and consent of the senate ten suitable persons who...shall constitute [the Board]....” 2011 H.B. 464.

RSMo 2000, was invalid. Under *State Tax Commission*, that is precisely what we cannot do.¹⁰

Whitfield did not demonstrate she had three years of experience in health care administration, supervising at least three people on-site

Exhibit C—Whitfield’s “Years of management experience”

To qualify to take the nursing home administrator licensure examination, Whitfield must show that she has three years’ experience in health care administration in satisfaction of § 344.030.2(2). Her primary vehicle for demonstrating her management experience was joint exhibit C, titled “My Years of managerial experience.”¹¹ In her testimony, Whitfield stated generally that Exhibit C reflected “the other responsibilities that [she does] administratively in addition to the MDS responsibilities.” Tr. 50. The exhibit sets out three categories of work activity: tasks (“participates in development and monitoring of department budgets,” “communicates with physicians...to maintain accurate assessments”), responsibilities (“responsible for the implementation and the supervision of the restorative nursing program and restorative aides”), and to a lesser extent, required job skills (“must be able to direct and coordinate the activities of others, provide a motivating influence on subordinates and peers, and take ownership in top management decisions”). We also note that, for each employer, Whitfield noted that she oversaw a number (between one and forty at each location) of “function subordinates.” For two employers, she also stated that she oversaw between one and three “traditional subordinates.”

¹⁰ Article IV, § 51 provides:

The appointment of all members of administrative boards and commissions and of all department and division heads, **as provided by law**, shall be made by the governor. All members of administrative boards and commissions, all department and division heads and all other officials appointed by the governor shall be made only by and with the advice and consent of the senate.

(Emphasis added). We note that in this case, there is no evidence in the record that the Board’s members were not appointed in the manner provided by law at the time of their appointment.

¹¹ Counsel and the witnesses often referred to the exhibit in the record marked “Exhibit C” as “Exhibit B,” and vice versa. We refer to the exhibits as they are marked in the record.

When we add the two types of supervisory experience together, they total more than three years, but Exhibit C indicates that the great majority of Whitfield's managerial experience was managing "function subordinates." As that term is never defined for us, we infer that it means she supervised staff for only certain functions. By contrast, the time Whitfield spent supervising "traditional subordinates" was only eight months. Thus, we cannot conclude that she possesses the requisite three years of full-time experience managing three or more staff persons in a licensed long-term care or acute-care facility or a licensed mental health facility, or a department of one of these facilities.

Exhibit B— "Core of knowledge areas"

Whitfield also invites us to examine Exhibit B, which matches up the subject areas listed as the "core of knowledge areas and other subject matter as deemed necessary by the board to properly prepare an applicant for health care administration" as set out in 19 CSR 73-2.031(2). Whitfield testified that it shows that she "[has] experience with almost every single one of the things [the Board suggests] for education." Tr. 51.

Whitfield's problem is that those suggested educational categories, and more particularly how she satisfied them, only indirectly address the health care administration experience required by the applicable statute and regulations. Instead, the core of knowledge areas and the ways Whitfield shows she satisfied them through her work exemplify her broad-based experience in nursing home work. Indeed, Whitfield testified that her employment plan was to "develop into an administrator" in order to get her nursing home administrator license. Tr. 50. To that end, she and her supervisors had set out a course "to help develop [her] into [her] chosen path, and that "the different things that [she did] administratively in addition to the MDS responsibilities" were set out in Exhibit B. *Id.* However, the law allows for only one way to

substitute experience for education, and that is through possession of three years' experience in health care administration.

What neither exhibit does, and more generally what Whitfield does not do, is satisfy the simple requirement to demonstrate that she has a total of three years' full-time experience supervising at least three people in health care administration. As we are unable to determine this from the evidence in the record, we conclude she did not carry her burden to show that she is qualified to take the nursing home administrator examination.

Summary

We deny Whitfield's application to take the examination for a nursing home administrator license.

SO ORDERED on October 16, 2014.

\s\ Karen A. Winn
KAREN A. WINN
Commissioner